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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON, PETITIONER,

VS.

JOHN C. TAYLOR, ACTING WARDEN

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 21, 1956

CERTIORARI GRANTED DECEMBER 10, 1956

SUPREME COURT OF THE UNITED STATES

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[a] In the United States District Court for the Middle
District of Pennsylvania

CHESTER E. JACKSON, PLAINTIFF

VS.

GEORGE W. HUMPHREY, WARDEN, DEFENDANT

COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS—
Filed March 29, 1954

Plaintiff herein, as and for his Complaint against the defendant, and for his Petition for a Writ of Habeas Corpus complains against the defendant and respectfully represents and shows to the Court:

(1) That he is a United States citizen, and at the date hereof is imprisoned in the U. S. Penitentiary at Lewisburg in the Middle District of Pennsylvania.

(2) That the defendant is the Warden of said U. S. Penitentiary.

(3) That on the 8th day of June, 1951, he, and two (2) companions, were brought to trial at Haengsong, Korea, before an Army Court-Martial, charged in manner and form as follows, to wit:

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private First Class Chester E. Jackson, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine.

Specification 2: In that Private First Class Chester E. Jackson, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, forcibly and feloniously, against her will, have carnal knowledge of an adult Korean female person whose name is unknown.

b.

(4) That upon conclusion of the trial, the Court announced the following findings or determination as to guilt of your petitioner:

[b] PRES. Private First Class Chester E. Jackson, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of Specification 1, guilty.

Of Specification 2, guilty, except the word, "have"; substituting therefor the words, "attempt to have;" of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge as to Specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96.

(5) That immediately thereafter, the Law Officer of the Court advised the members of the Court as follows:

LC: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949; page 296, "Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct."

The court will be closed.

(6) That thereafter the Court was closed at 11:50 A.M. on the 9th day of June, 1951, for deliberation as to the sentence to be imposed, and after twenty (20) minutes of deliberation the Court was opened, that is to say, at 12:10 P.M. on June 9, 1951; thereupon the Court announced the following sentence:

Private First Class Jackson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences you to be dishonorably dis-

charged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life.

(7) That the Law Officer of the Court did not instruct the Court on the subject of the sentence for the violation of the 96th Article of War--Specification 2, as amended by the Court to read, " * * * against her will, attempt to have carnal knowledge of an adult Korean female person whose name is unknown."

(8) That the Court did not at that time or at any other time adjudge any penalty or fix a punishment, or in any way or manner sentence your petitioner to imprisonment or confinement of any kind on account of the violation of Article of War 96 as described in Specification 2 as amended.

[c] (9) That the conviction and the sentence of your petitioner were subsequently reviewed by the Board of Review established in the office of the Judge Advocate General, pursuant to and by authority of the Uniform Code of Military Justice (64 Stat. 107).

(10) That on the 15th day of June, 1952, the said Board of Review announced its decision stating among other things, (p. 14) :

"In the absence of adequate proof linking the acts of the accused with the death of the victim of the attempted rape, we conclude that the findings of guilty of murder (Specification 1) are incorrect in law and fact and should be set aside (MCM, 1949, subpar. 179a, p. 232, "Proof").

In the light of this determination, it is unnecessary to discuss the propriety of the law officer's instruction pertaining to this specification."

(11) That although the life imprisonment sentence was imposed for the crime of murder for which the defendant was convicted, and that although such conviction was set aside by the Review Board for lack of sufficient evidence, nevertheless the Review Board did not set aside the entire sentence and set aside all of the sentence, except twenty

d

(20) years, as appears by the following except of their decision, (p. 14):

“By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at hard labor for life are improper. Under the vicious circumstances in this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.”

(12) That said Review Board has no power or authority under the Acts of Congress or the rules or regulations prescribed by the President to fix or determine any sentence for any crime but that said Review Board, by indirection, illegally and wrongfully, *by* effectively, sentenced your petitioner for a term of twenty (20) years of imprisonment, even though a General Court-Martial is the only tribunal having such authority.

(13) That the General Court-Martial before which your petitioner was tried, in amending Specification 2 to read, “attempt to have carnal knowledge,” laid said crime as a violation of the 96th Article of War, which Article is generally regarded as the “disorderly conduct” charge by [d] officers of the Army and which reads as follows:

“Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial; according to the nature and degree of the offense, and punished at the discretion of such court.”

(14) That the Review Board upon its reversal of the conviction for murder, and upon finding that the Trial Court had failed to assess a penalty for the violation of the 96th Article of War, should have remanded the case to the Trial Court for the purpose of fixing an appropriate sentence, or for a new trial.

(15) That the penalty which the said Review Board has attempted to fix against your petitioner is the maximum penalty permitted for the offense charged, and that said Review Board, in fixing said penalty did, by its language, to wit: "Under the vicious circumstances in this case a sentence of * * * twenty (20) years is appropriate * * *" indicate quite clearly, that although it had set aside the conviction of murder, it attempted, nevertheless, to punish your petitioner as and for such a crime. Your petitioner further invites the court's attention to an entire transcript attached hereto to show that, apart from the unhappy circumstance of the woman losing her life by means other than the hand or design of your petitioner, there were no "vicious circumstances" in the case, and that the actions of your petitioner were committed while he and his companions were intoxicated, and that such actions were more the outgrowth of wild soldiers on a lark, than they were the acts of men with genuine or real or vicious urge or inclination to have carnal knowledge with the unfortunate woman. Your petitioner further and specifically invites the court's attention to the confession obtained by the investigating officers and to the testimony of Sgt. Tigner on p. 37 of the transcript of testimony attached hereto.

(16) That said Review Board failed to heed the precepts of the Manual for Courts-Martial and the uniform Code of Military Justice, which provide that the Military Court in the exercise of its discretion in adjudging a sentence, should take in consideration the previous good character of the accused, penalties adjudged in other cases for similar offenses, the youthfulness of the offender, and the fact of his intoxication at the time of the offense.

(17) That your petitioner is imprisoned by color of authority of the United States, but that such imprisonment is unlawful and improper for the reason that he has never been sentenced by an Army Court-Martial for any crime for which he stands convicted, and such a Court was, and now remains, the only tribunal with authority to pass sentence on him.

(18) That the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reserved and set aside the conviction, was null and void.

(19) That there are attached to this Complaint and Petition a true, correct and complete transcript of the testimony taken by the Court-Martial referred to, together with the decision of the Board of Review hereinabove referred to, and the Petition for Grant of Review, and the Order issued by the United States Court of Military Appeals denying said Petition.

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Habeas Corpus may issue from said Court directed to the defendant and requiring him to bring before the Court the person of your petitioner to the end that the legality of his imprisonment may be judicially determined.

CHESTER E. JACKSON;
Plaintiff.

Duly sworn to by Chester E. Jackson. Jurat omitted in printing.

[f-g] [File endorsement omitted.]

[1-7] United States District Court for the Middle District
of Pennsylvania

[Title omitted]

RULE TO SHOW CAUSE—Filed April 2, 1954

NOW, to wit, April 2, 1954, upon consideration of the Petition filed in this cause, Rule is hereby granted upon the Respondent, George W. Humphrey, Warden, U. S. Penitentiary, Lewisburg, Pennsylvania, to show cause why a writ of habeas corpus should not be granted.

Rule returnable April 26, 1954.

A determination as to whether the petitioner should be produced for a hearing will be held in abeyance pending the filing of the Response and any traverse thereto.

FREDERICK V. FOLLMER,
United States District Judge.

[7a] United States District Court, Middle District of
Pennsylvania, 282 H.C.

[File endorsement omitted.]

[8] In United States District Court for the
Middle District of Pennsylvania

[Title omitted]

RESPONSE TO RULE TO SHOW CAUSE—Filed April 26, 1954

Comes now the respondent, George W. Humphrey, Warden, United States Penitentiary, Lewisburg, Pennsylvania, upon whom has been served a rule to show cause why a writ of *habeas corpus* should not issue for the production of Chester E. Jackson, and, by counsel, makes the following return to the said order, and respectfully shows that he holds the said Chester E. Jackson in custody as a

prisoner by authority of the United States, pursuant to a sentence of a general court-martial of the United States Army under the following circumstances:

I

That the said Chester E. Jackson was lawfully enlisted into the Army of the United States in the grade of private for a term of three years on 24 November 1947 (Exhibit A), and the said enlistment was extended for one year by operation of law (Act of 27 July 1950; 64 Stat. 379).

II

That on 21 May 1951 the said Chester E. Jackson was served with charges which alleged that on or about 16 March 1951, at Chudong-ni, South Korea, the said Chester E. Jackson did, in violation of Article of War 92 (formerly 10 USC 1564), murder an adult Korean female person whose name is unknown (Exhibit B).

[9]

III

That on 21 May 1952, the said Chester E. Jackson was served with charges which alleged that on or about 16 March 1951, at Chudong-ni, South Korea, the said Chester E. Jackson, in violation of Article of War 92, *supra*, did rape an adult Korean female person whose name is unknown (Exhibit B).

IV

That the said Chester E. Jackson was duly arraigned for this offense before a general court-martial, convened by paragraph 14, Special Orders No. 148, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California (Exhibit C, page 1). That the said Chester E. Jackson was convicted of attempted rape, and of murder, by the said general court-martial and was sentenced on 9 June 1951 to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life (Exhibit C, page 56).

V

That pursuant to the provisions of the Uniform Code of Military Justice, Article 61 (50 USC 648), the convening authority referred the record of petitioner's trial to his staff judge advocate for review. That the said staff judge advocate, after a review of said record of trial, submitted his written opinion thereon to the convening authority, in which he found that the sentence imposed upon the petitioner was correct in law and fact and recommended that the sentence be approved (Exhibit D).

[10]

VI

That on 3 July 1951, the sentence adjudged by the general court-martial was approved by the convening authority (Exhibit E). That the results of the petitioner's trial and the initial action of the convening authority were promulgated by General Court-Martial Orders Number 45, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 3 July 1951 (Exhibit F).

VII

That pursuant to the Uniform Code of Military Justice, Article 66 (50 USC 653), a Board of Review in the Office of The Judge Advocate General of the Army, reviewed the record of trial. That on 15 January 1952, the said Board of Review approved only so much of the findings of guilty as found the petitioner guilty of attempted rape in violation of Article of War 96 (formerly 10 USC 1568), and only so much of the sentence as included dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. The said Board of Review held that the findings and sentence, as thus approved, were correct in law and fact, and affirmed the findings and sentence as thus modified (Exhibit G).

VIII

That pursuant to the provisions of the Uniform Code of Military Justice, Article 67(b)(3) (50 USC 654), the petitioner after having been served with a copy of the decision of the Board of Review and notified of his right to appeal to the United States Court of Military Appeals for a grant

of review, elected to pursue that remedy, and at his request, appellate defense counsel filed a petition for grant of review and brief in support thereof on 29 April 1952 (Exhibit H). Appellate Government counsel filed a brief on behalf of the United States in opposition to the petition for grant of [11] review, on 2 May 1952 (Exhibit J), and on 2 June 1952 an order was issued by the said United States Court of Military Appeals denying said grant of review (Exhibit K).

IX

That the provisions of the Uniform Code of Military Justice, Article 71(c) (50 USC 658), having been complied with; General Court-Martial Order Number 709 was promulgated by the Commanding Officer, Camp Cooke, California, on 30 June 1952, the petitioner then being held in confinement at Camp Cooke, California. That the said order directed execution of the sentence to dishonorable discharge from the service, total forfeitures, and confinement at hard labor for twenty years, and directed that the petitioner be committed to the custody of the Attorney General of the United States or his designated representative for classification, treatment, and service of sentence to confinement (Exhibit L).

X

That the respondent lawfully holds the said Chester E. Jackson in custody under and by virtue of the aforesaid General Court-Martial Order Number 709, Headquarters Camp Cooke, California, dated 30 June 1952 (Exhibit L).

XI

Answering the following allegations in the "Complaint and Petition for Writ of Habeas Corpus" filed with this Court by the petitioner, the respondent admits, denies, and alleges as follows:

[12] 1. The respondent *admits* the allegations in paragraphs (1), (2), (3), and (4) of the petition.

2. The respondent *admits* that portion of paragraph (5) of the petition which sets forth the instruction on sentence given by the law officer, but *denies* that this instruction was

given immediately after the announcement of the findings.

3. The respondent *admits* the allegations in paragraph (6) and (7) of the petition.

4. The respondent *denies* the allegations in paragraph (8) of the petition.

5. The respondent *admits* the allegations in paragraphs (9) and (10) of the petition.

6. The respondent *admits* that portion of paragraph (11) of the petition which alleges that the petitioner was sentenced to life imprisonment, and that the Board of Review set aside all of the confinement in excess of twenty years, but *denies* the remaining allegations in said paragraph.

7. The respondent *denies* the allegations in paragraph (12) of the petition.

8. The respondent *admits* that portion of paragraph (13) of the petition which alleges that the petitioner was convicted of a violation of the 96th Article of War, *supra*, and *admits* that portion of paragraph (13) of the petition which sets forth the said 96th Article of War *in hæc verba*, but the respondent *denies* the remaining allegations in said paragraph.

9. The respondent *denies* the allegations in paragraph (14) of the petition.

10. The respondent *admits* that portion of paragraph (15) which alleges that the period of confinement sustained [13] by the Board of Review is the maximum permissible, but the respondent *denies* the remaining allegations of the said paragraph.

11. The respondent *denies* the allegations in paragraph (16) of the petition.

12. The respondent *admits* that portion of paragraph (17) of the petition which alleges that the petitioner is imprisoned by authority of the United States, but the respondent *denies* the remaining allegations of the said paragraph.

13. The respondent *denies* the allegations in paragraph (18) of the petition.

14. The respondent *admits* the allegations in paragraph (19) of the petition.

XII

For further answer, the respondent avers:

1. That the general court-martial by which the petitioner was convicted had jurisdiction over the person of the accused; that the offenses of which the petitioner was convicted were offenses over which the said general court-martial had jurisdiction; and that the said general court-martial, having been legally constituted, and the sentence being within the maximum authorized sentence for the offense of which the petitioner was found guilty, as modified and affirmed by the Board of Review, acted within the scope of its lawful powers.

2. That the instruction of the law officer as to sentence (Exhibit C, page 56) was given only after the full and proper presentencing procedure required by Appendix 8a, pages 520 and 521, *Manual for Courts-Martial, United States, 1951*, had been completed (Exhibit C, pages 54 and 55), and not immediately after the announcement of the findings of guilty by the president of the court-martial which tried the petitioner.

[14] 3. That all sentences imposed by a court-martial under military law are entire and single. That, accordingly, the law officer was under no duty to instruct the court-martial, on the maximum sentence imposable for attempted rape in violation of the 96th Article of War, *supra*.

4. That the sentence imposed by the court-martial upon the petitioner included a sentence for the offense of attempted rape, an offense included in the offense of rape charged, since a sentence of a court-martial is a sentence imposed for all the offenses of which an accused person has been convicted.

5. That the sentence imposed upon the petitioner, having been so imposed for all of the offenses of which the petitioner had been convicted, was divisible, and the Board of Review acted within its lawful powers in upholding the portion thereof which it approved (Uniform Code of Military Justice, Article 66(c), *supra*).

6. That the appropriateness of a sentence which is within the maximum authorized sentence is not within the scope of review by civil courts on *habeas corpus*.

7. That the Uniform Code of Military Justice (50 USC

554-736) provides an appellate process within the military establishment to review the proceedings of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the nation's Armed Services. That the trial of an appellate action on the petitioner's case were in conformity with the said Uniform Code of Military Justice, and the *Manual for Courts-Martial, United States, 1951* (16 Fed. Reg. 1303-1469).

[15] WHEREFORE, the respondent respectfully prays this Court that the order to show cause be discharged, the petition for writ of *habeas corpus* be dismissed, and the said Chester E. Jackson remain in the custody of the respondent.

J. JULIUS LEVY,
United States Attorney.

ROGER A. WOLTJEN,
*Assistant United States Attorney,
Counsel for Respondent.*

JAMES K. GAYNOR,
*Lieutenant Colonel,
Judge Advocate General's Corps,
United States Army,
Of Counsel.*

[15a] No. 282 Habeas Corpus

[File endorsement omitted.]

[16] United States District Court, for the Middle District
of Pennsylvania

Habeas Corpus No. 282

CHESTER E. JACKSON, PETITIONER

vs.

GEORGE W. HUMPHREY, WARDEN, RESPONDENT

OPINION—November 25, 1955

The petitioner, now a prisoner at the United States Penitentiary, Lewisburg, Pennsylvania, seeking a Writ of Habeas Corpus, was a soldier in the United States Army at

the time he was convicted by general court-martial in Korea on June 8, 1951. He was found guilty of the premeditated murder of a Korean woman on March 16, 1951, in violation of Article of War 92 (10 U.S.C. § 1564), and of the attempted rape of said person, in violation of Article of War 96 (10 U.S.C. § 1568). The general court-martial sentenced petitioner to be dishonorably discharged, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life.

On July 3, 1951, the sentence was approved by the convening authority of the general court-martial.

[17] On January 15, 1952, a board of review in the office of The Judge Advocate General set aside the conviction for premeditated murder and sustained the conviction for attempted rape. Consequently, it held the sentence of confinement at hard labor for life was improper and stated: "Under the vicious circumstances in this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape."¹ The sentence, as modified, was affirmed.

Although the charges under which petitioner was tried alleged violations of the Articles of War, the Uniform Code of Military Justice (50 U.S.C. § 51 et seq.) became effective on May 31, 1951, so that the trial on June 8, 1951 and subsequent proceedings were had under the Uniform Code.

The Law Officer, under the Uniform Code, does not deliberate with the court but is required to instruct the court upon the applicable law in the case (Article 51 (c) of the Uniform Code of Military Justice, 50 U.S.C. § 626).

The Law Officer instructed the court-martial that since the accused had been found guilty of premeditated murder, the only sentences authorized by law were death or imprisonment for life (Article of War 92, 10 U.S.C. § 1564).²

[18] He made no reference to the maximum for attempted rape, but this would have been superfluous since in court-

¹ Record of Trial, Respondent's Exhibit G, Page 14.

² Which is similar to the provision in Article 118 of the Uniform Code (50 U.S.C. § 712).

martial practice a sentence is entire and single, or, as is commonly stated, a general or gross sentence, and the court was required as a consequence of the conviction for pre-meditated murder, to impose a sentence of either death or life imprisonment.

Petitioner contends that the board of review having set aside the murder conviction for lack of evidence and having affirmed the conviction for attempted rape, should have ordered a rehearing or that the charges be dismissed, and as a sequitur, that petitioner should be released in this habeas corpus proceeding. What petitioner is in effect contending is that unless there are concurrent sentences on the various specifications as might be imposed on various counts of an indictment in the civil courts, the prisoner goes set free if the military board of review sets aside the conviction on one of the specifications.

Col. Winthrop in 1896 in his classic treatise³ on military law states:

“In the absence of any statutory direction on the subject, usage has established that the sentence of a court-martial shall be, in every case, an *entirety*; that is to say that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences.”⁴

[19] This practice has never been changed in any Articles of War, Manuals for Courts-Martial or the recent Uniform Code of Military Justice. This was recognized by the Court of Military Appeals in *United States v. Keith*, 4 Court-Martial Reports, 34, 40,

“* * * The concurrent sentence, in the sense in which that device is utilized in the administration of criminal

³ See comment in *Toth v. Quarles*, Slip Opinion United States Supreme Court, November 7, 1955, Note 8.

⁴ *Winthrop's Military Law and Precedents*, 2d Ed. (1920), Page 404.

law in the civilian community, is entirely without precedent in military procedure. See Manual for Courts-Martial, *supra*, paragraphs 76, 125, 126, 127. Under military law a single inclusive sentence is imposed—the sum of individual punitive actions deemed legal and adequate—regardless of the number or character of the offenses of which the accused has been convicted. It will be obvious that a rule which has its basis in a concurrent sentence situation is not an appropriate subject for importation into a system in which the instrument lying at the basis of the principle is unknown, and a unitary sentence is always assessed.”

Nor is the gross or general sentence unknown to the civil law. In *Jones v. Hill*, 3 Cir., 71 F. 2d 932, it was recognized that

“ * * * The great weight of authority in the federal courts holds that such sentences are not void and that a general or gross sentence may be imposed under an indictment containing more than one count so long as it does not exceed the aggregate of the punishments which could have been imposed upon the several counts. * * * ”

While there has been a tendency in some of the civil courts recently to criticize the general sentence as loose practice,⁶ it certainly does not involve a want of due process or affect the jurisdiction or power of the military courts. Neither is there anything startling or shocking in the construction by the military courts that a general sentence, where conviction on one or more specifications is set aside, remains valid to the extent that it is applicable to the remaining specifications. The civil courts have, in the past, applied the same doctrine. In *McKee v. Johnston, Warden*, 9 Cir., 109 F. 2d 273, a general sentence of seventeen years

⁶ See also *McDowell v. Swope*, 9 Cir., 183 F. 2d 856, 858; *United States v. Sposato*, 2 Cir., 73 F. 2d 186; *McKee v. Johnston, Warden*, 9 Cir., 109 F. 2d 273.

⁷ *McDowell v. Swope*, 9 Cir., 183 F. 2d 856; *United States v. Kararias*, 7 Cir., 170 F. 2d 968; *Morrison v. Hunter, Warden*, 10 Cir., 161 F. 2d 723.

had been imposed. It was contended that some counts were invalid and that the remaining counts did not support the full seventeen year sentence. The court said:

"It is well settled that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence a nullity, but leave open to attack on habeas corpus only such portion of the sentence as is excessive. * * *

In the civil procedure it is possible to remand the case to the trial court for resentencing⁸ or for correction of the sentence,⁹ but this is not practicable in the military system. This is well stated by the Court of Military Appeals in *United States v. Keith*, supra,¹⁰ wherein, in holding that such power was vested in the intermediate appellate court known as the Board of Review, it said:

"* * * Were the setting of the present case a civilian one, we would experience no difficulty in remanding to the court trying the accused for reconsideration of sentence or for retrial. In a military situation, however—and for reasons which must be apparent to all—this disposition of the matter is impracticable, if not impossible of achievement. In view of the lapse of time involved, it is highly probable that the court-martial which tried the accused, Keith, is no longer functioning as such. Through change of assignment, or otherwise, its members, indeed, may be scattered beyond recall. Even assuming the contrary in the present situation, the mentioned impossibility is certain to exist in many others involving an identical problem.

⁷ See also *McDonald v. Johnston*, Warden, 9 Cir., 149 F. 2d 768, 769; *Dimenza v. Johnston*, Warden, 9 Cir., 131 F. 2d 47.

⁸ *Moss v. United States*, 6 Cir., 132 F. 2d 873; cf. *United States v. Lynch*, 7 Cir., 159 F. 2d 198.

⁹ *McDonald v. Johnston*, Warden, 9 Cir., 149 F. 2d 768.

¹⁰ See also *United States v. Bigger*, 8 Court-Martial Reports 97.

Remand to the trial forum, for virtually any purpose in the military scene, is a difficult business, and remand from this Court simply an unworkable device. Fortunately it is also an unnecessary one. The Uniform Code of Military Justice, Article 66(c), 50 USC § 653, provides as follows:

'In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and *the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. (Emphasis supplied)'

Had the board of review, following its appearance before that body, disapproved the findings of guilty as to the misbehavior charge in the present case, it could have affirmed only 'such part or amount of the sentence, as it . . . (found) correct in . . . fact and . . . (determined), on the basis of the entire record, should be approved.' This Court is without statutory authority to act in such a manner. We may, however, correct a board of review in matters of law—and this we have done in the instant case with respect to board action on the charge specifying an instance of misbehavior. Accordingly, we now remand the case to The Judge Advocate General, United States Army, for reference to the board of review for the purpose of determining the adequacy of the sentence. See Uniform Code of Military Justice, Article 67(f), 50 USC § 674. * * *

[22] Sentencing is a post trial procedure, a stage beyond the actual trial, as to which the Army must make its own determination through its own tribunals. There is nothing abhorrent in the thought of separating the sentencing and the guilt finding functions. There have been suggestions

in relation to the civil courts that "once the judge has performed his duty as presiding officer at the trial and guilt is established the disposition would be turned over to a sentencing board * * *."

Recently the Honorable Simon E. Sobeloff, Solicitor General of the United States, in addressing the Section of Criminal Law of the American Bar Association, proposed that appellate courts be given the power to review sentences imposed.¹² Nor have appellate courts hesitated to reduce sentences in excess of the maximum. In *Spiro v. United States*, 2 Cir., 24 F. 2d 796, the court said:

" * * * The sentence is void merely for the excess. *Dodge v. United States*, 258 F. 300, 306 (C. C. A. 2), 7 A. L. R. 1510. In *Wechsler v. United States*, 158 F. 579 (C. C. A. 2), this court, under similar circumstances, reversed and remanded to the District Court, with instructions to enter a sentence in accordance with the statute. We see no reason, however, why we may not adopt the less cumbersome procedure of correcting the sentence by our own mandate, as was done in *Salazar v. United States*, 236 F. 541 (C. C. A. 8); *Priori v. United States*, 6 F. (2d) 575 (C. C. A. 6); *Goode v. United States*, 12 F. (2d) 542 (C. C. A. 8); *Jackson v. United States*, 102 F. 473 (C. C. A. 9)."

[23] The Supreme Court in *Bozza v. United States*, 30 U.S. 160, 166, aptly said:

" * * * This Court has rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.' In re Bonner, supra at 260. The Constitution does not require that sentencing should be a game in which a wrong

¹¹ Developing Systematic Sentencing Procedures by Judge William J. Campbell in September 1954 issue of the Federal Probation Journal of the Administrative Office of the United States Courts, Vol. 18, No. 3, at page 7. Judge Campbell does not favor this course.

¹² *American Bar Association Journal*, January 1955, Vol. 41, No. 1, Page 13.

move by the judge means immunity for the prisoner. See *King v. United States*, 69 App. D.C. 10, 15, 98 F. 2d 291, 296. * * * ¹³

Since a court-martial is generally beyond recall after the trial, certainly the power to correct a sentence in a situation such as we now have before us, must lie somewhere within the military system and the Court of Military Appeals, the highest court in the military system,¹³ has made the determination where that power lies. It does not involve a lack of jurisdiction or a want of power within the military system which would justify this Court in interfering therein. Within the military system the action of the board of review was proper and within its authority.

In *DeCoster v. Madigan*, 7 Cir., 223 F. 2d 906, in a habeas corpus proceeding involving a defendant involved in the same crime with the petitioner, the court arrived at a different conclusion. Its reasoning is predicated upon the proposition that "Imposition of sentence by the proper authority is an essential step in administration of criminal [24] justice." But the fallacy lies in attempting to determine for the army what constitutes such proper authority within the military system instead of leaving that determination of a procedural matter to the Court of Military Appeals. This Court is in accord with the conclusion arrived at by Judge Finnegan in his dissenting opinion. What effect, in the light of the Supreme Court's opinion in *Toth v. Quarles*, supra, the dishonorable discharge would have upon an attempt to resentence on the theory of the majority opinion that the original sentence was void, need not be decided here.

The application for Writ of Habeas Corpus will be denied and the Rule to Show Cause discharged.

FREDERICK V. FOLLMER,
United States District Judge.

November 25, 1955.

¹³ See also *Coy v. Johnston*, Warden, 9 Cir. 136 F. 2d 818, 820, cert. den. 320 U.S. 788, reh. den. 320 U.S. 815; *King v. United States*, App. D.C. 98 F. 2d 291, 296; *McDowell v. Swope*, supra.

¹⁴ *Burns v. Wilson*, 346 U.S. 137, 141, Note 7.

[25] In United States District Court

ORDER DISCHARGING WRIT OF HABEAS CORPUS—November 25,
1955

And now to wit., November 25, 1955, for the reasons set forth in the foregoing Opinion, the petition of Chester E. Jackson for Writ of Habeas Corpus is accordingly denied, and the Rule to Show Cause issued thereon is discharged.

FREDERICK V. FOLLMER,
United States District Judge.

[25a] [File endorsement omitted.]

[26] In the United States Court of Appeals for the Third
Circuit

[Title omitted]

STIPULATION OF COUNSEL FOR SUBSTITUTION OF A PARTY AND
APPROVAL THEREOF—May 7, 1956

Counsel for Appellant, Urban P. Van Susteren, and counsel for Appellee, J. Julius Levy, United States Attorney in and for the Middle District of Pennsylvania, hereby stipulate and agree, subject to the approval of the Court, to the substitution of John C. Taylor for George W. Humphrey, Defendant-Appellee; the latter party having been replaced as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, by John C. Taylor, as Acting Warden.

(S.) URBAN P. VAN SUSTEREN,
Counsel for Appellant.

(S.) J. JULIUS LEVY,
United States Attorney.

April —, 1956

Approved: May 7, 1956, Goodrich J.

[27] In United States Court of Appeals for the Third Circuit

No. 11,808

CHESTER E. JACKSON, APPELLANT

v.

JOHN C. TAYLOR, ACTING WARDEN

Appeal from the United States District Court, for the Middle District of Pennsylvania

Argued April 17, 1956

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed May 31, 1956

By HASTIE, *Circuit Judge*.

A general court-martial, convened in Korea on June 8, 1951, found the petitioner, a soldier in the United States Army, and two other soldiers guilty of the premeditated murder of a Korean woman and of an attempt to rape her somewhat earlier the same day. Under military law either death or life imprisonment is the mandatory punishment for premeditated murder. Attempted rape is punishable by imprisonment not to exceed 20 years. See Table of Maximum Punishments, Manual for Courts-Martial, U. S. 1951, 219, 221. Each of the accused soldiers was sentenced to life imprisonment. The convening authority approved this action, but a board of review, while sustaining the conviction [28] of attempted rape, found the conviction of murder unwarranted and set it aside. With reference to the sentence imposed by the court-martial the board of review ruled as follows:

"By reason of the . . . action herein taken as to the murder specification, the sentences [imposed upon the three soldiers] of confinement at hard labor for life are improper. Under the circumstances in this case, a sentence of dishonorable discharge, total forfeiture and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape."

Procedurally, the board undertook to modify and reduce the life sentence to a sentence of imprisonment for 20 years and ordered the sentence affirmed as thus modified. *United States v. Fowler, et al.*, 1952, 2 C.M.R. 336. The United States Court of Military Appeals denied a petition for further review. 1952; 1 U.S.C.M.A. 713. It is conceded that no question was raised before that tribunal as to the authority of the board of review to modify the sentence in the manner described above.

To serve this 20 year term petitioner was committed to a federal penitentiary in the Middle District of Pennsylvania. While there confined he has instituted this habeas corpus proceeding in the district court challenging the validity of the modified sentence.

Petitioner does not claim any deprivation of constitutional right. He contends only that under military law the board of review was without authority to change the life sentence to one of 20 years' imprisonment, instead of ordering either a new trial or his release. One of the petitioner's confederates, who had been convicted with him and whose sentence had been reviewed and modified at the same time and in the same way, but who was imprisoned in Indiana, has already successfully urged this contention in the Seventh Circuit. *DeCoster v. Madigan*, 7 Cir. 1955, 223 F.2d 906. However, in the present case, the district court was [29] not persuaded by the claim of invalid sentencing and, accordingly, denied the petition. *Jackson v. Humphrey*, 1955, 135 F. Supp. 776. This appeal followed.

As stated above, the question of the reviewing board's resentencing power under military law, now raised by petition for habeas corpus, was not raised by the petitioner before the Court of Military Appeals when he asked that court to review the action of the board of review. Therefore, the government argues that the issue should not be considered now for the first time on habeas corpus. Cf. *Burns v. Wilson*, 1953, 346 U.S. 137. But, believing the district court reached the correct conclusion on the merits, we shall not decide whether the same result could properly have been reached by denying the propriety of habeas corpus as a remedy in the circumstances in this case. Compare the reasoning of the concurring opinion in *United States ex rel. Aul v. Warden*, 3 Cir. 1951, 187 F.2d 615, 620.

The appropriate procedures on review and the powers of the reviewing authorities in this case are prescribed by the Uniform Code of Military Justice, 50 U.S.C., c. 22, which became effective on May 13, 1951. Article 66(c) of that code confers and defines the power of a board of review as follows:

"In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. . . ." 64 Stat. 128, 50 U.S.C. § 653.

Here, the board of review, in changing the petitioner's sentence from life imprisonment to 20 years, thought it was properly exercising the power Article 66 (c) gives it to ". . . affirm . . . such part or amount of the sentence as it finds correct. . . ." Opposing this view, petitioner [30] argues that the 20 year term approved by the reviewing authority is not a "part or amount of the sentence" imposed by the court-martial, but rather is a distinct original sentence and, therefore, beyond the power of the reviewing board.

To resolve this dispute we must discover for what offense or offenses the court-martial imposed the life sentence. Unquestionably, the accused was found guilty of two distinct offenses. And thereafter, in imposing a single sentence, the court did not state the relation of that sentence to either or both of the offenses. However, it is the normal, traditional and well understood practice in the administration of military justice that "there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses." 1 Winthrop, Military Law, 2d ed. § 615. And see *Carter v. McClanghry*, 1901, 183 U.S. 365, 393; *United States v. Keith*, 1952, 1 U.S.C.M.A. 444, 448. And at the time of this trial that usage was embodied in

the authoritative teaching of Manual for Courts-Martial that "[i]t is the duty of each member [of the court] to vote for a proper sentence for the offense or offenses of which the accused has been found guilty. . . ." Manual for Courts-Martial, U.S. 1951, Art. 76 b (2). Indeed, this gross sentence practice is so firmly established that it seems to be followed routinely without recital that the court is doing so.

But special circumstances are pointed out here to lend color to a claim that this case is different. First, the law officer followed the normal practice of advising the court after verdict and before sentence as to the maximum punishment it might impose. See Manual for Courts-Martial, U.S. 1951, Art. 76 b (1). In this connection he told the court that, the prisoner having been found guilty of murder, the court's sentencing power was limited to two alternatives, a death sentence or a sentence of life imprisonment. He said nothing about punishment for attempted rape. So, petitioner reasons, punishment for attempted rape was not in fact considered by the court and was not in fact or law a component of its sentence. Second, petitioner attempts to reinforce this position by arguing that the sentence imposed is on its face the minimum sentence for premeditated murder, and that this establishes as a matter of arithmetic that no punishment was imposed for attempted rape.

Ingenuous though this line of argument is, and persuasive though it has been to a majority of the division which decided *DeCoster v. Madigan, supra*, in another circuit, we reject it. To begin with, it was not possible for the court which found the petitioner guilty of both premeditated murder and attempted rape to order imprisonment for either a long or a shorter period than it did. For under military law the death sentence is the only lawful alternative to life imprisonment, once a defendant has been found guilty of premeditated murder, whether alone or in addition to some other crime. Thus, the failure of the law officer to say anything to the court about the maximum punishment for attempted rape suggests nothing more than that he understood how pointless such an explanation would have been in the posture of this case. Moreover, the arithmetical

argument that a sentence for two offenses must be longer than the minimum sentence required for one of them ignores both the practical difficulty of imprisoning for life plus any number of years and the absence of provision for any such oddity in the rules which control military sentencing. See Manual for Courts-Martial, U.S. 1951, Art. 76 b (4) and Appendix 13. We conclude that in the circumstances of this case the court-martial imposed and military law reasonably recognizes the single sentence of life imprisonment as punishment for both murder and attempted rape. Cf. *United States v. Gephart*, 1952, 4 C.M.R. 306, petition for review denied, 2 U.S.C.M.A. 670. And see note [32] 1956, 65 YALE L.J. 413. The board of review reduced this sentence for murder and attempted rape to the lesser punishment which it deemed appropriate for the crime of attempted rape alone.

The only other basis suggested for this challenge to the validity of the modified sentence is that in reducing the original sentence to 20 years, the maximum for attempted rape, the board of review may well have exceeded the punishment which the court-martial would have imposed for that offense alone.¹ It is, of course, conjectural what sentence the court-martial would have imposed for attempted rape in the absence of the murder conviction. But the power to resentence, for either a lesser offense or a smaller number of offenses than established by the verdict of the court-martial, without any indication of what the trial tribunal would have done in similar circumstances, is a characteristic feature of military review of criminal convictions.² Presently, authority for that practice is to be

¹ Upon this basis, we are informed, the District Court for the Northern District of Georgia, in an unreported case, *Fowler v. Hardwick*, decided Dec. 27, 1955, invalidated the sentence of the third soldier involved in this crime, saying in its order: "This court cannot assume that, had he not been sentenced for murder however, his sentence for attempted rape would have been twenty years."

² But the resentence must not be arbitrarily severe, even though within the statutory maximum. *United States v. Voorhees*, 1954, 4 U.S.C.M.A. 5091.

found in the already quoted provision of Article 66 (c) of the Uniform Code of Military Justice authorizing a board of review to "... affirm ... such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

We think a grant of power in such terms clearly contemplates the exercise of independent judgment by the reviewing authority as to the appropriate sentence on modified findings, subject only to the statutory prohibition against increasing the original gross sentence. Certainly, this construction comports with military understanding and procedure in uncounted numbers of cases. A few, recently [33] reported, are cited in the margin.³ Such reasonable

³ a. Cases of sentence reduction after less than all of the trial findings of guilty have been approved. *United States v. Beninate*, 1954, 4 U.S.C.M.A. 98 (originally 3 years for desertion and 3 unauthorized absences, reduced on review to legal maximum for the unauthorized absences alone); *United States v. Wellman*, 1954, U.S.C.M.A. 348, (originally 1 year for desertion and failure to obey an order, reduced on review to 6 months for failure to obey an order alone); *United States v. Blau*, 1954, 5 U.S.C.M.A. 232 (originally 3 years for 14 specifications of false official statements and violations of regulations, reduced to 1 year by convening authority on elimination of 8 violations, further reduced to 9 months by board of review on elimination of yet another violation).

b. Cases of sentence reduction where guilt of lesser included offense is substituted for guilt of offense originally charged. *United States v. Bigger*, 1953, 2 U.S.C.M.A. 297, (premeditated murder verdict changed to unpremeditated murder and sentence reduced from death to life imprisonment, the maximum for the included offense); *United States v. Walker*, 1953, 3 U.S.C.M.A. 355 (10 years for unpremeditated murder, reduced to 2 years for involuntary manslaughter); *United States v. Smith*, 1954, 4 U.S.C.M.A. 369 (1 year for larceny from mail, reduced to 6 months for petit larceny).

c. Cases where original sentence affirmed despite vacation of some of the findings of guilty. *United States v.*

reading and administration of the legislatively approved military code should not be disturbed by the civil courts.

The judgment will be affirmed.

[34] In United States Court of Appeals for the Third Circuit

No. 11,808

CHESTER E. JACKSON, APPELLANT

vs.

JOHN C. TAYLOR, ACTING WARDEN

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

JUDGMENT—May 31, 1956

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration, whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IRA O. CRESKOFF,

Clerk.

May 31, 1956.

[File endorsement omitted.]

Long, 1952, 2 U.S.C.M.A. 45, (death sentence for two offenses of rape, premeditated murder and two assaults with intent to do bodily harm with a dangerous weapon; one assault conviction set aside and premeditated murder reduced to unpremeditated murder but death sentence affirmed); *United States v. Eagleson*, 1954, 3 U.S.C.M.A. 685, (sentence of dismissal and \$50. fine for reckless operation of a motor vehicle and leaving the scene of an accident; reckless operation charge set aside but sentence approved).

[35] ORDER STAYING ISSUANCE OF MANDATE (omitted in Printing)

[35a] Clerk's Certificate to foregoing transcript omitted in printing.

[36] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1956

No. 234 Misc.

[Title omitted.]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

ORDER ALLOWING CERTIORARI—December 10, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the gross sentence question. The case is transferred to the appellate docket as No. 619 and placed on the summary calendar.